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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 607

MERIDIAN, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States.

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MERIDIAN, INC.,

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PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the United States.

To the Honorable Supreme Court of the United States:

I.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case September 4, 1963.

II.

OPINIONS BELOW.

The Memorandum Findings of Fact and Opinion of the Tax Court of the United States in this case dated March 20, 1962, are reported at 21 T. C. M. 321 and are set forth at page 65a of the Appendix below, of which nine extra copies are filed herewith. The opinion of the United States Court of Appeals for the Sixth Circuit dated September 4, 1963, is unreported as yet, and is set forth at page 17 of the Appendix hereto.

III.
JURISDICTION.

This case arises under the provisions of the 1954 Internal Revenue Code of the United States. This action was originally brought in the Tax Court of the United States. Upon petition to review, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the Tax Court. The judgment of the United States Court of Appeals was filed on September 4, 1963.

The statutory provision conferring upon the Supreme Court of the United States jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is 28 U. S. C. § 1254(1).

IV.
QUESTIONS PRESENTED.

The basic question presented in this case concerns the definition of the word "primarily" as used in Section 1221 and Section 1231 of the Internal Revenue Code of 1954 which deny capital gains with respect to profits realized from the sale of property held by a taxpayer "primarily for sale to customers in the ordinary course of his trade or business." The issue is whether "primarily" means "pre-eminently," "principal," or "chief," or whether the mere existence of a willingness upon the taxpayer's part to sell, if the opportunity presents itself, constitutes holding property "primarily for sale to customers in the ordinary course of his trade or business."

Specifically, the questions presented for review stated in the terms and circumstances of this case are as follows:

(a) Whether the courts below erred in ruling that commercial property constructed by the taxpayer

for a tenant's use and leased for twenty-one years with an option to purchase exercisable only at the end of the fifth year on ninety days advance notice, was property "held primarily for sale in the ordinary course of his trade or business" within the meaning of Sections 1221 and 1231 of the Internal Revenue Code of 1954, because the taxpayer's corporate charter, inter alia, gave it the power to dispose of property and because the taxpayer had included purchase options in leases of several other commercial properties, which options were exercised subsequently.

(b) Whether the courts below erred in ruling that where property is leased with an option to purchase, it is held for the dual purpose of lease or sale and consequently it is held "primarily for sale in the ordinary course of the taxpayer's trade or business" within the meaning of Sections 1221 and 1231 of the Internal Revenue Code of 1954.

(c) Whether the courts below erred in ruling that where purchase options are included in the taxpayer's long-term leases, one of the essential purposes in holding the property is sale and, consequently, the property is held "primarily for sale in the ordinary course of his trade or business" within the meaning of Sections 1221 and 1231 of the Internal Revenue Code of 1954.

V.

STATUTES INVOLVED.

The statutory provisions involved in this action are Sections 1221 and 1231 of the Internal Revenue Code of the United States of 1954, which read as follows:

"SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;" * * *

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

Sec. 1231(a).

"(a) GENERAL RULE—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months." * * *

Sec. 1231(b).

"(b) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS—For the purposes of this section—

"(1) GENERAL RULE—The term property used in the trade or business means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not—

(A) * * *

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *."

VI.

STATEMENT OF THE CASE.

The facts in this case are undisputed and, for the most part, were stipulated.

The Appellant, Meridian, Inc., is an Ohio corporation which was incorporated April 26, 1948. (R. 12a) The purpose clause of the taxpayer's charter gave it a number of powers including the power "to purchase, acquire, hold, convey, lease, mortgage or dispose of property, real or personal, tangible or intangible." (R. 12a) The corporation engaged in the business of acquiring business building sites, negotiating leases, usually for fifteen years or more, with tenants of good financial standing and erecting general purpose warehouse and office buildings on these sites for the occupancy of such tenants. (R. 62a-64a) In most of the leases the tenants insisted upon purchase options as a condition of entering into the leases. (R. 63a) The buildings were constructed at cost by an associated company, M. DeBartolo Construction Company, (R. 14a) according to plans and specifications mutually agreeable to Meridian, Inc. and its tenants. (R. 64a, 66a)

From 1948 through 1961, Meridian, Inc. entered into eight leases, most of which were for long terms and six

of which contained options to purchase. (R. 13a) Five of the six options were exercised at various times between 1949 and 1960. (R. 13a)

The present case specifically arose out of a lease between Meridian, Inc. and the Century Food Markets Co. entered into in July, 1949, for a term of twenty-one years with the tenant having the right to purchase only on one occasion, viz. at the end of the fifth year. (R. 26a-33a) During the first five years Meridian, Inc. by the terms of its contract was not free to dispose of the property, but was permitted by the lease to sell at any time after the five-year period. (R. 33a.) The rentals received were good and the lease was favorable from Meridian's standpoint.[1] (R. 17a) The tenant exercised the option at the end of the fifth year, resulting in a profit to Meridian, Inc. of approximately $134,292.39. (R. 8a) Meridian, Inc. returned the profit as a capital gain but the Commissioner determined that the profit was taxable as ordinary income. (R. 8a) The Tax Court of the United States sustained the Commissioner's determination and the Court of Appeals for the Sixth Circuit affirmed the Tax Court.

---

[1] The lease was for twenty-one years with the rental payments as follows: for the first six years $37,200 a year; for the next five years $36,000 a year; or the next five years $34,800 a year; and for the last five years $29,000 a year. (R. p. 28a.) Taxes, insurance and repairs averaged less than $5000 per years during first five years of lease. (R. p. 17a.)

VII.

REASONS FOR GRANTING THE WRIT.

Stated summarily, the reasons for granting this writ are as follows:

(1) The decisions of the United States Court of Appeals and the Tax Court add to the confusion which already exists with respect to the meaning of the word "primarily" in Sections 1221 and 1231 of the Internal Revenue Code of 1954.

(2) The decisions of the United States Court of Appeals and the Tax Court have foreclosed capital gains treatment to a taxpayer engaged in leasing commercial properties who accedes to the tenants' demands for the inclusion of purchase options in the lease agreements.

(3) The decision of the Court of Appeals has foreclosed capital gains treatment to a corporate taxpayer whose charter empowers the corporation, inter alia, to "purchase, acquire, hold, convey, lease, mortgage, or dispose of property, real or personal."

A discussion of the reasons for granting the writ follows.

VIII.

ARGUMENT.

1.

The decisions of the United States Court of Appeals and the Tax Court add to the confusion which already exists with respect to the meaning of the word "primarily" in Sections 1221 and 1231 of the Internal Revenue Code of 1954.

"Primarily" is defined by *Webster* as "first of of all," "fundamentally," "principally." When "primarily" refers to order of importance it means "in the first place." The use of "primarily" in Section 1231 of the Internal Revenue Code of 1954 implies that a taxpayer may hold property for several purposes. Applying *Webster's* definition, it is only when sale is the foremost purpose in order of importance for holding the property that the property loses its status as a capital asset.

Commencing with the decision in *Rollingwood v. Commissioner*, 190 Fed. 2d 263 (CA-9, 1951),[2] confusion

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[2] In the *Rollingwood* case, which involved the construction of seven hundred houses for rental to war workers and their sale over a period of less than four years both to tenants and to others, the Court denied the benefits of capital gains provisions to the builder, saying:

> "Although the requirements of the statute are to some extent overlapping, the emphasis in this case is whether the houses were held primarily for sale or primarily for rent. Petitioners contend that the word 'primarily' means 'principal' or 'chief,' while the Commissioner contends it means 'essential' or 'substantial.' For reasons hereinafter stated we think the latter view is more consonant with the legislative policy.
>
> Suppose the taxpayer in the instant case intended to rent the houses for as long as he was required to do so under existing regulations and then to sell them. Or suppose his intention was to pursue whichever of these activities proved

(*Continued on following page*)

has been building up with respect to the meaning of the word "primarily" in the capital gains sections of the Internal Revenue Code. In the *Rollingwood* case, the Ninth Circuit ruled that "primarily" does not mean "principal" or "chief," but rather, "essential" or "substantial." The Court went on to say that if one of the essential purposes in holding the property is sale, the capital gains provisions of the law are not applicable. In other words, if sale were an essential purpose in holding the property, even though not the principal or chief purpose, the property lost its status as a capital asset.

In *S. E. C. Corp. v. United States*, 140 F. Supp. 717, D. C. S. C., New York, aff'd. per curiam, 241 F. 2d 416 (CA-2, 1957), certiorari denied, 354 U. S. 909, the Second Circuit followed the *Rollingwood* case holding that "primarily" means "essential" or "substantial" rather than "principal" or "chief."

(*Continued from preceding page*)

to be the most profitable, that is, if the *rental market* were good he would continue to rent but if the *sales market* were high he would sell. In either of these suppositions we think it is fair to say that one of the essential purposes (in acquiring or holding the houses) is the purpose of sale. Under such circumstances, if the taxpayer does dispose of the houses by sale, is it within the legislative *purpose* to allow him to treat the proceeds of these sales as a capital gain? We think not.

(5) The capital gains provisions are remedial provisions. Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is *sale*.

* * *"

However, in *Philber Equipment Corp. v. Commissioner*, 237 F. 2d 129 (CA-3, 1956),[3] the Third Circuit re-

[3] In the *Philber* case, motor vehicles were acquired, used and disposed by the taxpayer in the conduct of his motor vehicle rental business. Substantial gains were realized in the disposition of these vehicles. The Commissioner claimed the disposition was part of the business cycle and the Tax Court, relying on the *Rollingwood* case, held that the gain was ordinary income since sale was one of the essential purposes in acquiring the motor vehicles. The United States Court of Appeals Third Circuit, in reversing the Tax Court, said as follows:

"(1) With respect to that finding it must be noted it was in the nature of an ultimate finding of fact and since such finding is but a legal inference from other facts it is subject to review free of the restraining impact of the so-called "clearly erroneous" rule applicable to ordinary findings of fact by the trial court, as we recently held in Curtis Co. v. Commissioner, 3 Cir., 1956, 232 F. 2d 167. To the same effect see Smith v. Commissioner, 5 Cir., 1956, 232 F. 2d 142.

With respect to the question as to whether or not taxpayer held the property primarily for sale to customers in the ordinary course of its trade or business, the Commissioner contends that "primarily" means "substantial" or "essential" rather than "principal" or "chief." In Rollingwood Corp. v. Commissioner, 9 Cir., 1951, 190 F. 2d 263, 266-267, the Commissioner's definition was adopted. Rollingwood was one of the numerous war-time housing operation cases where individuals normally in the business of selling houses were required to turn to rental activities due to war-time restrictions. Anticipation of selling activities with respect to the rental housing is an important consideration in many of these cases, so that the dual purpose of rental and sale is quite an inseparable factor in determining for what purpose the property is "primarily" held. Whether "primarily" means "substantial" or "principal" is not dispositive of the question, and attempts to seek an alternative definition of the statutory word is an illusive guide to the solution of a problem which must rest upon the variation of facts presented. Semantic excursions are often necessary to formulate a working guide under inexplicit statutory phrasing; however, words are seldom meaningful unless their application to the facts is for the purpose of more clearly posing the question, not answering it.

(2, 3) The basic problem is whether, as the Commissioner contends, the property was acquired for the dual purpose of leasing for a period substantially less than its use-

(*Continued on following page*)

fused to accept the *Rollingwood* definition of "primarily." The Third Circuit ruled that property is held primarily for sale only if the taxpayer's business is operated with the final gains from the sale of the property as the determining business purpose. The Court returned to the *Webster* definition of "primarily" by requiring that the profit from sales be the principal reason for the taxpayer engaging in the business.

Then, in *Hillard v. Commissioner*, 281 F. 2d 279 (CA-5, 1960), the Fifth Circuit endorsed the decision of the Third Circuit in the *Philber* case and rejected the Commissioner's argument that "primarily" meant "ultimately."

Now the lower Courts in the instant case have further reduced a taxpayer's chances of obtaining capital gains by ruling that there may be more than one "primary" purpose in holding property. According to them, it is no longer necessary to determine what the taxpayer's foremost purpose was in acquiring and holding property. If he indicates a willingness to sell, then sale is a "primary" purpose and he is deemed to hold the property "primarily"

(Continued from preceding page)

ful life, and thereafter selling; or, as the taxpayer urges, its purchase, use and ultimate disposition were directed to the single purpose of operation of a truck rental business. We are here concerned with a going operation which involves continuous rental, purchase and sale, and the determinative factor is the purpose for which the property was held at the time of its acquisition and during the period of its use. United States v. Bennett, 5 Cir., 1951, 186 F. 2d 407; Latimer-Looney Chevrolet, Inc., 1952, 19 T. C. 120. The final sale of the property can only be decisive if the taxpayer's business was operated with the final gains from the sale of the vehicles as a determining business purpose. We think the record supports the taxpayer's contention that the acquisition, use and disposition of its equipment was consistent with the business purpose of vehicle rental and not vehicle sale.

* * *"

for sale in the ordinary course of his trade or business within the meaning of the Internal Revenue Code.

Thus, at the present, the Internal Revenue Service and the Tax Court hold that "primarily" means "essentially" or "substantially" rather than "chief" or "principal." The United States Courts of Appeals for the Second and Ninth Circuits also apply this definition of "primarily." The Sixth Circuit holds that if "a" primary purpose in holding property is sale, then such property is held primarily for sale in the ordinary course of taxpayer's trade or business. And the Third and Fifth Circuits consistent with the *Webster* definition of "primarily" require, that the final gains from the sale of the property be the dominant or determining purpose of holding the property before property is deemed to be held primarily for sale in the ordinary course of taxpayer's trade or business.

It is submitted that this confusion should be resolved.

2.

The decisions of the United States Court of Appeals and the Tax Court have foreclosed capital gains treatment to a taxpayer engaged in leasing commercial properties who accedes to the tenants' demands for the inclusion of purchase options in the lease agreements.

The Tax Court based its decision in this case squarely on the options which were included in Meridian's leases. The Court said as follows (Appendix 74a):

> "It is apparent from a review of the transactions that each lease negotiated by petitioner in the first two years of its existence contained an option to purchase, which option was subsequently exercised by the lessee. And as pointed out by the Commissioner it was not until after the statutory notice of deficiency in this case had been issued that straight lease agreements

were executed. The options granted by petitioner were in effect offers to sell. *Joseph A. Harrah*, 30 T. C. 1236 (1958). And so far as we can see, petitioner held the property for the dual purpose of lease or sale."

The Court of Appeals concurred with this reasoning (Appendix, p. 19):

"In considering whether the decision of the Tax Court was clearly erroneous, regard must be had for the various circumstances relating to the lease and sale of the property by Meridian, Inc. to Century Markets. It was one of five leases negotiated during a two-year period. The building was constructed for Century Markets in accordance with the plans of its architect, and, afterward, modified, with its approval. Each of the five above-mentioned leases contained an option to purchase. Each option to purchase was, in effect, an offer to sell. In all of the five leases the option to purchase was exercised, and, accordingly, in all five instances, the properties were sold by Meridian, Inc. to the former lessees. We mention these four other transactions in which Meridian, Inc. was involved in order to place its transaction with Century Markets in the context of Meridian's entire, and, as might be termed, its usual, operations."

Inasmuch as the decision of the Tax Court has been cited already by legal authorities as supporting the general proposition that options are offers to sell and gain on the exercise thereof is ordinary income (*Taxes*, Vol. 40, fn., p. 820), the affirming decision of the Sixth Circuit United States Court of Appeals herein may well be considered by the Commissioner of Internal Revenue to have conclusively established this rule.

The decisions of the two lower Courts ignore the fact that options are normally placed in leases to encourage rental activity and, as an added inducement to the rental

business. It was testified in this case that the options were not willingly given but were demanded by the tenants as a condition of making the leases. (R. 63a.) Furthermore, both lower Courts ignored the fact that an option, which is binding only on the property owner does not necessarily encourage the sale of property and may even be a deterrent to sale. Since an option places a ceiling on the selling price without any assurance that the property will be sold, no property owner interested in selling or disposing of his property willingly includes an option in a long-term lease of the property. The existence of an option to purchase in a long-term lease indicates, at the most, only a willingness to sell upon certain terms and conditions and a restricted option, which was the type of option in the transaction under review, emphasizes the fact that the property is held first and foremost for rental purposes with sale being a mere possibility.

If the definition of "primarily" announced in the *Philber* case were applied to the instant case, the leased premises were clearly a capital asset. Inasmuch as sale of the premises was extremely uncertain, depending upon the exercise of an option at the end of the fifth year of a twenty-one year term and since the rentals were favorable, gain on the sale was not the determining purpose in Meridian's acquiring and holding the leased premises. It is interesting to note that neither the United States Court of Appeals nor the Tax Court mentioned the *Philber* case. The *Rollingwood* case, however, was referred to by both Courts.

3.

The decision of the Court of Appeals has foreclosed capital gains treatment to a corporate taxpayer whose charter empowers the corporation, inter-alia, to "purchase, acquire, hold, convey, lease, mortgage, or dispose of property, real or personal."

The United States Court of Appeals for the Sixth Circuit stressed a new factor in this case in affirming the decision of the Tax Court. Although the Tax Court did not comment on the corporate charter of the Appellant, the Court of Appeals asserted that the inclusion in the taxpayer's corporate charter of a power to purchase, hold or dispose of property, real or personal, indicated that "a" primary as well as an essential part of the business of Meridian was the sale of property. The Court commented as follows (Appendix, p. 19):

> "The sale of real estate appears to have been a primary, as well as an essential, or substantial, part of the business of Meridian, Inc., inasmuch as one of the purposes for which it was formed, according to its corporate charter, was 'to purchase, acquire, hold, convey, lease, mortgage, or dispose of property, real or personal * * *.' A corporation may have a dual purpose,—or, two purposes, one of which is equally as important as the other. *Bauschard v. Commissioner, supra.*"

Certainly this decision will furnish grounds for the Commissioner of Internal Revenue to deny capital gains treatment to every corporate taxpayer whose charter contains such general language. Inasmuch as such language is common to corporate charters, especially those whose draftsmen have attempted to make them as comprehensive as possible, this decision will curtail, in no small measure, the ability of corporations to obtain benefits of capital gains.

IX.

CONCLUSION.

By torturing the definition of "primarily" into such meanings as "substantially," "essentially," or "a primary purpose," the United States Courts of Appeals for several Circuits have given the Commissioner of Internal Revenue and the Tax Court the means for depriving taxpayers of the benefits of capital gains provisions of the Internal Revenue Code. Few taxpayers can honestly contend that the eventual disposition of property at a profit was not one of the factors which entered into their acquisition or holding of the property.

Since there are other United States Courts of Appeals which follow the plain and unambiguous meaning of the sections of the Internal Revenue Code dealing with capital gains the state of the law is now confused. For all of the reasons hereinbefore mentioned, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

MCALLISTER, Senior Circuit Judge. This is an appeal from the decision of the Tax Court in which it held that the gain arising from the sale of certain property, which had been leased with an option to purchase, was ordinary income rather than capital gain from the sale of a capital asset.

The DeBartolo Company is a corporation engaged in constructing buildings, and operating real estate. In order to carry out its construction projects, the DeBartolo Company formed a separate company, Meridian, Inc., the taxpayer in this case. Among the corporate objectives of Meridian, Inc, were the securing of building sites, the arranging of financing by long-term mortgages, and the negotiation of leases for buildings to be constructed by the DeBartolo Company. These buildings were to be constructed at cost, according to plans and specifications provided by Meridian, Inc. and its tenants. From 1948 through 1961, Meridian, Inc. negotiated eight long-term leases, usually for fifteen years or more, with tenants of good financial standing. Six of the leases contained an option to purchase. Five of the six options to purchase were extended to tenants of Meridian, Inc. The sixth option to purchase was extended to a third party. The five options to purchase that were granted the tenants of Meridian, Inc. were exercised as follows:

Transaction	*Date of Lease*	*Date of Exercise of Option*
1. Whittmer-Jackson Co.	Aug. 28, 1948	July 1, 1960
2. Ohio Machinery Co.	Oct. 1948	Dec. 17, 1952
3. 7-Up Bottling Company	May 1949	Aug. 19, 1949
4. Century Food Mkts. Co.	July 1949	Dec. 28, 1954
5. Paul M. Fithian	Nov, 1949	Sept. 1950

This case arose out of the fourth lease above mentioned which Meridian, Inc. made with the Century Food Markets Company, hereafter called the Century Markets. Meridian, Inc., according to the agreement, was to erect, at a contract price of $385,000, a warehouse and office building in accordance with certain revised plans and specifications prepared by an architect obtained by Century Markets. The lease was for twenty-one years, with an option to purchase. The rental payments provided in the lease, were as follows: For the first six years, $37,200 a year; for the next five years, $36,000 a year; for the next five years, $34,800 a year and, for the last five years, $29,000 a year.

The Century Food Markets Company, in the lease, was given an option to purchase the property for $346,000, later increased to $347,625. However, the option could be exercised only at the end of the fifth year of the leased term. If Century Markets did not exercise its option at that time, then Meridian, Inc. could sell the leased premises on the open market at any time after the fifth year of the lease. Century Markets exercised the option to purchase the property on December 28, 1954.

The Commissioner of Internal Revenue determined that the profit of Meridian, Inc. in the amount of $135,292.39 from the sale of the property to Century Markets was taxable as ordinary income and not as capital gain. The Tax Court sustained the Commissioner's determination on

the ground that the profit on the sale of the property "was derived from property held by petitioner primarily for sale to customers in the ordinary course of its trade or business," and, not being proceeds from the sale of a capital asset, was ordinary income. Title 26 U. S. C., Section 1221, 1958 Ed.

The determination that property was held primarily for sale to customers in the ordinary course of business is a factual determination; each case turns upon its own particular facts; no one circumstance or factor is controlling. *Bauschard v. Commissioner*, 279 F. 2d 115 (C. A. 6). Under well-settled principles, such factual determination may not be disturbed upon appeal, unless it is clearly erroneous. *United States v. Gypsum Co.*, 333 U. S. 364, 395. "Primarily," as used in Title 26, U. S. C. 1221, has been held to mean "essentially" or "substantially." *Greene-Haldeman v. Commissioner*, 282 F. 2d 884 (C. A. 9); *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263 (C. A. 9); and sometimes the decision of a case turns upon the interpretation of those terms. We do not consider that any distinction between "primarily," or "essentially," or "substantially" is a controlling consideration in this case.

The sale of real estate appears to have been a primary, as well as an essential, or substantial, part of the business of Meridian, Inc. inasmuch as one of the purposes for which it was formed, according to its corporate charter, was "to purchase, acquire, hold, convey, lease, mortgage, or dispose of property, real or personal * * *." A corporation may have a dual purpose,—or, two purposes, one of which is equally as important as the other. *Bauschard v. Commissioner, supra.*

In considering whether the decision of the Tax Court was clearly erroneous, regard must be had for the various circumstances relating to the lease and sale of the

property by Meridian, Inc. to Century Markets. It was one of five leases negotiated during a two-year period. The building was constructed for Century Markets in accordance with the plans of its architect, and, afterward, modified, with its approval. Each of the five above-mentioned leases contained an option to purchase. Each option to purchase was, in effect, an offer to sell. In all of the five leases the option to purchase was exercised, and, accordingly, in all five instances, the properties were sold by Meridian, Inc. to the former lessees. We mention these four other transactions in which Meridian, Inc. was involved in order to place its transaction with Century Markets in the context of Meridian's entire, and, as might be termed, its usual, operations.

Considering the corporate objectives of Meridian, Inc.; the construction of the buildings for the special convenience and use of the various lessees in accordance with their plans and specifications; the right reserved to Meridian, Inc. to sell the properties at any time after the first five-year period of the leases, if the options to purchase were not exercised at that time; the exercise of the options, and the sale of the properties; we are unable to conclude that, under the applicable statute, the Tax Court was clearly erroneous in its determination that one of the primary or essential purposes of Meridian, Inc. was the holding of property for sale to customers in the ordinary course of its trade or business, and that the gain realized from its sale to Century Markets was ordinary income.

The decision of the Tax Court is, accordingly, affirmed.

JUDGMENT.

(Filed Sept. 4, 1963)

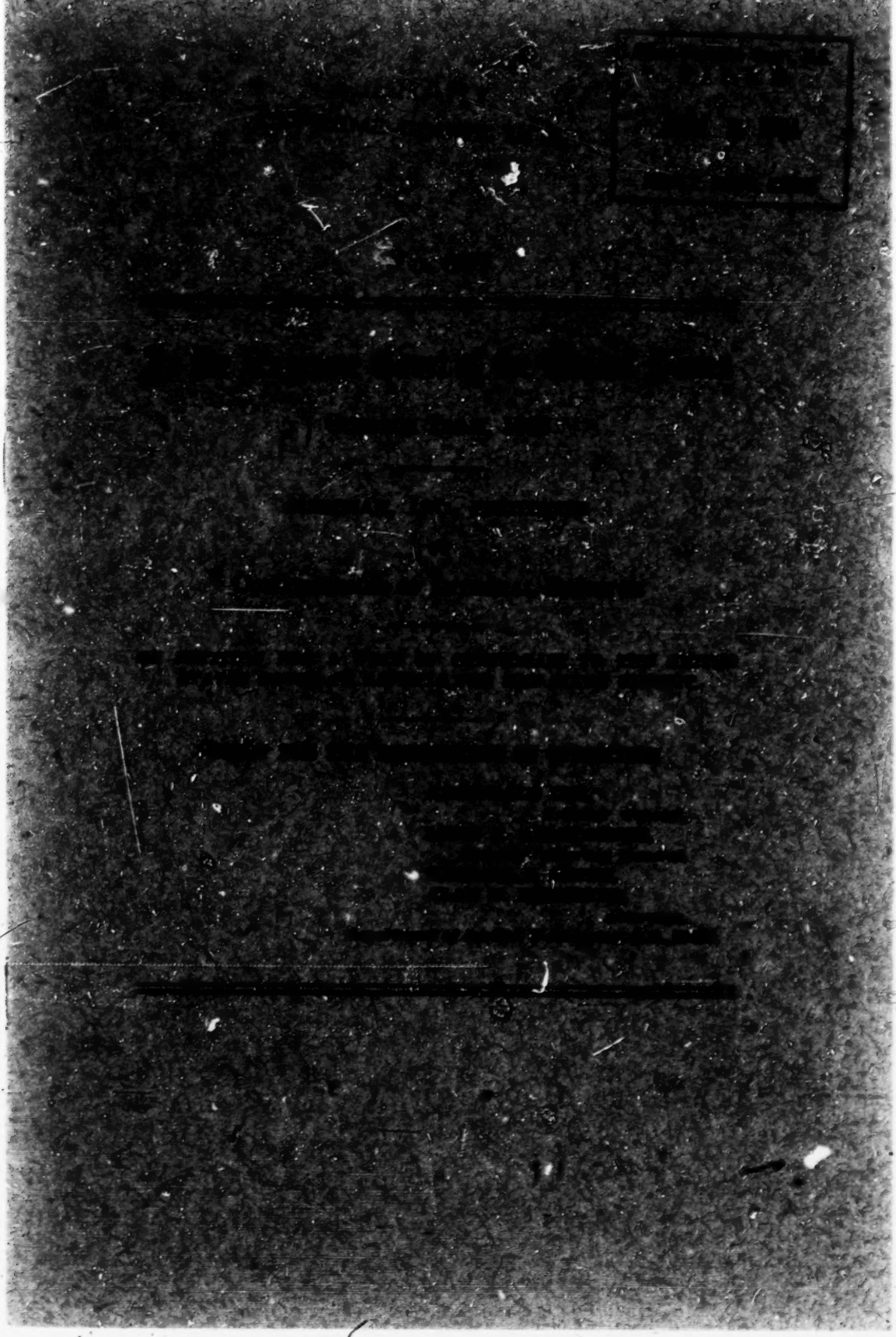
On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

Approved for entry:

THOMAS F. MCALLISTER,
Senior Circuit Judge.



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 607

MERIDIAN, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R.65a–78a)[1] are not officially reported.[2] The opinion of the court of appeals (Pet. 17–20) is reported at 322 F. 2d 198.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1963 (Pet. 21.) The petition for a

[1] "R." references are to the appendix to taxpayer's brief in the court of appeals.

[2] *Meridian, Inc.* v. *Commissioner*, decided March 20, 1962 (P-H Memo T.C., par. 62,059).

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writ of certiorari was filed on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly determined that real property sold by the taxpayer in 1954 was held primarily for sale to customers in the ordinary course of taxpayer's business and, consequently, that the profit realized from the sale was taxable as ordinary income rather than as capital gains.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 1221. CAPITAL ASSET DEFINED.
>
> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—
>
> (1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
>
> * * * * *
>
> (26 U.S.C. 1958 ed., Sec. 1221.)

STATEMENT

The taxpayer is a corporation organized in 1948. According to its corporate charter, one of the purposes for which it was formed was "To purchase, ac-

quire, hold, convey, lease, mortgage, or dispose of property, real or personal * * *" and its corporate objectives were, among other things, to secure building sites, to arrange financing by obtaining long-term mortgages, and to negotiate leases for buildings to be constructed by the DeBartolo Company, an associated company which was instrumental in organizing the taxpayer. These buildings were to be constructed at cost and according to plans and specifications provided by taxpayer and its tenants (R. 66a; Pet. 17).

From 1948 through 1961, taxpayer negotiated eight long-term leases, in most cases for fifteen years or more, with tenants of good financial standing. Five leases gave the tenant an option to purchase; a sixth option was given to a third party (R. 13a–14a, 19a–43a; Pet. 17). The five options to the tenants were exercised as follows (R. 13a; Pet. 17–18):

Transaction	Date of Lease	Date of Exercise of Option
1. Whittmer-Jackson Co	Aug. 28, 1948	July 1, 1960
2. Ohio Machinery Co	Oct. 1948	Dec. 17, 1952
3. 7-Up Bottling Co	May 1949	Aug. 19, 1949
4. Century Food Markets Co	July 1949	Dec. 28, 1954
5. Paul M. Fithian	Nov. 1949	Sept. 1950

This case concerns the lease that taxpayer made with Century Food Markets Company (Century). Under the agreement, taxpayer, at a cost of $385,000, was to erect a warehouse and office building in accordance with certain revised plans and specifications prepared by an architect obtained by Century (R. 70a; Pet. 18). The lease was for 21 years (R. 70a;

Pet. 18) with rental payments as follows (R. 71a; Pet. 18):

First 6 years	$37,200 per annum
Next 5 years	$36,000 per annum
Next 5 years	$34,800 per annum
Next 5 years	$29,000 per annum

The lease also provided that Century was to have an option to purchase the buildings for $346,000, later increased to $347,625. The option could be exercised only at the end of the fifth year of the lease term. If Century did not exercise its option, the taxpayer could sell the leased premises on the open market at any time after the fifth year. (R. 71a; Pet. 18). Century exercised its option to purchase on December 28, 1954, the end of the fifth year of the lease (Pet. 18).

The Commissioner of Internal Revenue determined that taxpayer's profit ($134,292.39) from the sale to Century was taxable as ordinary income and not as capital gain. The Tax Court sustained the Commissioner's determination because the profit "was derived from property held by petitioner [taxpayer] primarily for sale to customers in the ordinary course of its trade or business" (R. 8a; Pet. 18–19). The court of appeals affirmed.

ARGUMENT

Section 1221(1) of the Internal Revenue Code of 1954, *supra*, excludes from the definition of a capital asset property held "primarily for sale to customers in the ordinary course of his [a taxpayer's] trade or business." Both courts below correctly held that the

property involved here was in that category, and there is no occasion for further review by this Court.

1. The decision below is not in conflict with that of any other court. In *Philber Equipment Corp. v. Commissioner*, 237 F. 2d 129 (C.A. 3), upon which taxpayer chiefly relies,[3] the Third Circuit held that the taxpayer was entitled to capital gain treatment upon the sale of certain trucks used in his motor vehicle rental business. The Commissioner had relied upon *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263, where the Ninth Circuit held that the term "primarily," as used in § 1231, means "substantial" or "essential," rather than "principal." Without disputing the result reached in *Rollingwood* or even the definition there adopted, the court in *Philber* pointed out (237 F. 2d at 131) that "attempts to seek an alternative definition of the statutory word is an illusive guide to the solution of a problem which must rest upon the variation of facts presented," and hence that "[w]hether 'primarily' means 'substantial' or 'principal' is not dispositive" of the question presented. The basic problem in the case before it, in the court's view, was whether the vehicles were acquired by the taxpayer for the "dual purpose" of leasing and then selling them, or whether the ultimate sale was merely incidental to the "single purpose" of

[3] *Hillard* v. *Commissioner*, 281 F. 2d 279 (C.A. 5), also cited by the taxpayer, involved a factual situation almost identical to that in *Philber* and disposed of the legal issue largely on the authority of the Third Circuit's decision in that case. Accordingly, *Hillard* is no more in conflict with the decision below than is *Philber*.

operating a truck rental business. The sale would be decisive, the court said, only if the taxpayer's business was operated with the final business gains from the sale of the vehicles "as a determining business purpose."

Whatever its merits, *Philber* is plainly not in conflict either with *Rollingwood* or, more important, with the decision below. And any difference in approach there may be between the Third and Ninth Circuit cases is of no assistance to the taxpayer here, since it is clear he could not prevail under either of them. Indeed, the test adopted by the court below is virtually the same as that applied in *Philber*. Here, as there, the court noted that "We do not consider that any distinction between 'primarily,' or 'essentially,' or 'substantially' is a controlling consideration in this case. The sale of real estate appears to have been a primary, as well as an essential, or substantial, part of the [taxpayer's] business * * *" (Pet. 19). Like the Third Circuit, the court below recognized (Pet. 19) that a corporation may have a "dual purpose—or, two purposes, one of which is equally as important as the other." And while the court below was prepared to treat the sale proceeds as ordinary income upon a showing that the sale of the property was "a" primary part of the taxpayer's business, the Third Circuit would have reached the same result had it been satisfied that the sale of the vehicles was "a determining business purpose."

2. There is no basis for the contention that the decison below "will furnish grounds for the Commis-

sioner of Internal Revenue to deny capital gains treatment to every corporate taxpayer whose charter contains" general language such as that contained in the taxpayer's charter here (Pet. 15). The taxpayer's corporate purposes, as set forth in its charter, were only one of many factors properly taken into account by the district court. The other considerations were summed up in the concluding paragraph of the court of appeals' opinion (Pet. 20) and provide an entirely adequate basis for the decision:

> Considering the corporate objectives of Meridian, Inc.; the construction of the buildings for the special convenience and use of the various lessees in accordance with their plans and specifications; the right reserved to Meridian, Inc. to sell the properties at any time after the first five-year period of the leases, if the options to purchase were not exercised at that time; the exercise of the options, and the sale of the properties; we are unable to conclude that, under the applicable statute, the Tax Court was clearly erroneous in its determination that one of the primary or essential purposes of Meridian, Inc. was the holding of property for sale to customers in the ordinary course of its trade or business, and that the gain realized from its sale to Century Markets was ordinary income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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